

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

ECHO LAKE INDUSTRIES, LTD.
Employer

and

Case No. 29-RC-9618

INTERNATIONAL BROTHERHOOD OF
TRADE UNIONS, LOCAL 713
Petitioner¹

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Noemi Wasserstrom and Sharon Chau, Hearing Officers of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The Hearing Officers' rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The record indicates that Echo Lake Industries, Ltd., herein called the Employer or Echo Lakes, is a domestic corporation with its sole office and place of

¹ The Petitioner's name appears as amended at the hearing. (See Board Exhibit 2.)

² The undersigned Regional Director hereby amends the transcript sua sponte as indicated in the Appendix attached hereto. References to the record are hereinafter abbreviated as follows: "Tr. #" refers to

business located at 170 Express Street, Plainview, New York, where it is engaged in the non-retail sale and distribution of imported clothing, hosiery and other accessories. The parties stipulated that, during the past year, which period was representative of its operations generally, the Employer, in the course and conduct of its business operations, sold and shipped goods valued in excess of \$50,000 from its Plainview facility directly to customers outside the State of New York.

Based on the stipulation of the parties, and on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The International Brotherhood of Trade Unions, Local 713, herein called the Petitioner, seeks to represent a unit of all full-time and regular part-time warehouse employees employed by the Employer at its Plainview, New York facility, but excluding all clerical employees, managerial employees, guards and supervisors as defined in the Act.³

There is no dispute that the petitioned-for unit constitutes an appropriate unit for the purposes of collective bargaining. However, the Employer contends that one individual, Henry Sandoval (whom the Employer calls the “warehouse manager”), is a

transcript page numbers, "Bd. Ex. #" refers to Board exhibit numbers, and "Er. Ex. #" refers to Employer exhibit numbers.

supervisor as defined in Section 2(11) of the Act, and that he is therefore illegible for inclusion in the unit. By contrast, the Petitioner claims that Sandoval is a non-supervisory “leadperson” who must be included in the unit.

In support of its position on the supervisory issue, the Employer called four witnesses to testify: Larry Khazzam (the Employer’s vice president, co-owner, and son of Isaac Khazzam), Isaac Khazzam (president, co-owner, and father of Larry Khazzam), Irene Lory (office employee who deals with payroll, accounts payable and import logistics), and Rhonda Nathan (office employee who deals with accounts receivable and electronic orders). The Petitioner called three witnesses to testify: Henry Sandoval, and warehouse employees Mario Quinonez and Marco Cartagna.

Facts

As noted above, the Employer imports clothing and accessories from abroad, and distributes them to various retailers within the United States. The Employer employs approximately 7 employees in its warehouse, which occupies 14,000 square feet of the Plainview facility’s first floor. The warehouse contains three loading docks near a shipping/receiving area; numerous aisles of shelves for storing the merchandise; a “preparation area” with a long table where outgoing orders are prepared for shipping; and an area with a desk, telephone, bulletin board and some filing cabinets. The facility’s second floor contains approximately 1,500 to 2,000 square feet of office space, where various managerial and office employees work. (Witnesses often referred to the warehouse and office areas, respectively, as “downstairs” and “upstairs.”)

The Employer hired Henry Sandoval as a warehouse employee approximately 3 to 3½ years ago. Vice president Larry Khazzam testified that Sandoval began to “prove

³ The petitioned-for unit appears as amended at the hearing. (Bd. Ex. 2.)

himself” as a leader in the warehouse about a year ago (April 2000) and, in effect, assumed supervisory duties at that time, although he was not officially promoted until October 2000.

The witnesses’ testimony differed greatly as to whether Sandoval has hired, or effectively recommended hiring, warehouse employees. The Employer’s witnesses generally testified that Sandoval has “brought in” people who immediately started working in the warehouse, without having been interviewed by the Khazzams or anyone else “upstairs.” By contrast, although Sandoval agreed that he brought potential employees to the warehouse, he also testified that they were hired only after talking to someone upstairs. Furthermore, Sandoval and other Petitioner witnesses testified that warehouse employees often recommend friends and family members for employment, as part of the Employer’s informal, “word of mouth” recruitment of new employees.

Specifically, Larry Khazzam⁴ testified that in April 2000, Sandoval hired a warehouse employee named Eduardo Pacheco. Since the warehouse was busy at that time, the Employer had placed a help-wanted advertisement in a newspaper, but had also asked Sandoval and others if they knew anyone available for work.⁵ There is no dispute that Sandoval brought Pacheco to the warehouse. In somewhat speculative testimony, Larry stated that, if there was any kind of interview process, then Sandoval must have interviewed Pacheco. Larry specifically testified that he himself did *not* interview Pacheco. The first that Larry knew of Pacheco’s employment was when office employee

⁴ To avoid repeating the last names of Larry Khazzam and Isaac Khazzam, they will sometimes be referred to herein simply as Larry and Isaac.

⁵ In response to questions about whether he asked employees if they knew anyone looking for a job, Larry stated that the company “always asked people if they knew people to recommend,” that the company specifically asked Sandoval and other workers in April 2000, and that it was “public knowledge” that the company was looking for warehouse help (Tr. 77-9).

Irene Lory asked him for permission to put Pacheco on the payroll, which he granted. Pacheco was hired at the Employer's standard starting rate for warehouse employees, \$8.50 per hour. By contrast, Sandoval testified that he did not hire Pacheco. According to Sandoval, company president Isaac Khazzam asked if he knew of anyone available for work, and Sandoval responded yes, that his brother-in-law Pacheco was available. A few days later, on the following Monday, Sandoval brought Pacheco to the warehouse. Sandoval testified that Pacheco went upstairs to the office and, after about 15 minutes, came back down to start working in the warehouse. Sandoval gave hearsay testimony -- based on what Pacheco allegedly told him -- that Pacheco spoke to, and was hired by, Isaac. (Pacheco himself did not testify in this proceeding.) A third version of events was given by Isaac Khazzam, who denied interviewing Pacheco. Specifically, Isaac testified that he asked if Sandoval knew anyone; that a couple of days later, Sandoval brought in Pacheco; that Sandoval briefly introduced Pacheco to Isaac in the warehouse; that Pacheco and Isaac only said hello to each other; and that Isaac told Sandoval to tell Pacheco to go upstairs and "register his information" (e.g., tax and immigration forms). Finally, a fourth version of events was given by payroll clerk Lory. Although she did not testify in detail regarding Pacheco's hiring, she generally testified that she is usually the first to arrive at the facility and open the door at 8:30 a.m.; that she has seen Sandoval bring new people (i.e., faces she did not recognize) to the facility when warehouse employees start at 9:00 a.m.; that she has seen Sandoval show these new people how to punch a time card⁶; and that it was not until later in the day that Isaac authorized her to

⁶ Lory explained that there are a number of blank time cards near the Employer's timeclock, which is located in the office area upstairs. At the beginning of each work week, employees simply write in their name by hand on a new card. In this way, Lory claimed, Sandoval was able to have each new employee

add each new person to the payroll. Lory also testified that, in her three years of employment with Echo Lakes, she never interviewed Pacheco or any other applicants for warehouse positions, and that she has never seen Isaac interview any job applicants.⁷

The Employer also alleges that Sandoval hired, or effectively recommended hiring, a warehouse employee named Rudy DeLeon in September or October 2000. Larry and Isaac Khazzam generally testified that Sandoval “brought in” DeLeon at a time when the Employer needed additional warehouse help; that they (the Khazzams) did not interview DeLeon; and that they merely authorized Lory to put him on the payroll after the fact. Lory testified that she saw a new face in the warehouse one afternoon; she asked Isaac who was the “new guy downstairs,” and Isaac told her that Sandoval brought DeLeon in, and that she should get his information for payroll purposes. By contrast, Sandoval completely denied having brought DeLeon to the warehouse for employment. Rather, Sandoval testified that it was warehouse employee Mario Quinonez who referred DeLeon. Quinonez similarly testified that he (Quinonez), not Sandoval, referred his friend DeLeon for employment, and that DeLeon was then hired by somebody “upstairs.”⁸ Quinonez, who has worked at Echo Lake for five years, also testified that he has referred other employees over the years, including Sandoval himself, Ignacio Estrada, and Julio “Tony” Laeva.

punch a card in the morning and start working immediately, even though their “paperwork” was not processed by the office until later.

⁷ By contrast, warehouse employee Marco Cartagna testified that Isaac interviewed him when he was hired.

⁸ On cross examination, when the Petitioner asked Isaac whether it was Quinonez who referred DeLeon, Isaac responded “I doubt it.”

The Employer's witnesses provided other examples of employees whom Sandoval allegedly hired. Lory testified that Sandoval hired current employee Alfredo Augustin Perez, as well as former employees Jose Gilberto Rodriguez, Hector Mendez and Julio "Tony" Laeva. Sandoval admitted referring Perez for employment,⁹ but denied referring Mendez and Laeva. (As stated above, warehouse employee Quinonez testified that he himself recruited Laeva.) However, it appears from Isaac Khazzam's testimony that these employees were hired more than a year ago, before Sandoval allegedly became a supervisor. For example, Isaac testified that Perez was hired two or two-and-a-half years ago. On cross examination Isaac stated that he did not recall the details of Mendez being hired, and that he only recalls the details of "recent" hires Pacheco and DeLeon, i.e., within the past year.

The Khazzams also testified regarding the discharge of an employee named Robert (last name not specified in the record) in January 2001, and the extent to which Sandoval was involved. Larry initially testified that Sandoval had complained on "a number of occasions" about Robert's performance in the warehouse, and recommended Robert's discharge. However, Larry later explained that Sandoval had complained about Robert only once or twice; that the Employer did nothing in response to those complaints; that Sandoval did not actually recommend discharging Robert; and that Robert was eventually discharged by the "office" for an infraction that had "nothing to do with the warehouse function." Specifically, Robert was fired because he brought a woman to the facility and had some kind of intimate contact with her on the premises, which Larry

⁹ Thus, Sandoval admits referring a total of two employees for employment, Pacheco and Perez. However, as described above, Sandoval denies actually interviewing or hiring these employees, and insisted that they were reviewed and hired "upstairs." Thus, contrary to an assertion at p. 10 of the

characterized as inappropriate and immoral. Larry conceded that Robert would have been fired for this behavior, even if Sandoval had not previously complained about Robert's job performance. Similarly, Sandoval testified that, although he had complained about Robert, he did not recommend Robert's discharge, and had no input regarding Robert's eventual discharge for the unrelated infraction. Isaac testified that Sandoval had complained about Robert on "many occasions," and that the incident with "the girl in the warehouse" was the "last straw."

Larry Khazzam testified that, shortly after Sandoval was officially promoted in October 2000, Sandoval devised a set of written rules governing the warehouse (Er. Ex. 1). The rules resulted from a meeting which the Employer held in the office to brainstorm about ways to improve operations. According to Larry, Sandoval was invited to give input regarding the warehouse operations. The rules, which Sandoval drafted a few days later, covered such issues as lunch time, use of the warehouse phone for personal calls, and various rules regarding orders being shipped by United Parcel Service (UPS) or trucking companies. The last rule (#8) says: "Anyone do [sic] not follow warehouse instructions will be suspend[ed]." As a specific example of a rule allegedly devised by Sandoval, Larry testified that Sandoval "took it on himself" to designate a certain location of the warehouse for storing outgoing orders to be shipped by UPS (rule #6), to make the UPS pick-ups easier at the end of each day. Larry also testified that he subsequently approved the rules (marking the document "All OK, L.K."), and that they are in fact the rules governing the warehouse now. In response to a leading question as to

Employer's post-hearing brief, Sandoval did *not* concede that those two were "hired based solely on his recommendation."

whether Larry ever told Sandoval that he had the authority to suspend employees, Larry answered affirmatively.

Sandoval admitted that he physically wrote the “rules” document, but he claimed to be neither the exclusive source of the ideas therein, nor the enforcer of said rules. Specifically, Sandoval testified that, one week before the “brainstorming” meeting, Rhonda Nathan asked Sandoval and the other warehouse employees to make suggestions for improving the warehouse. Sandoval claimed that he talked to the warehouse employees, that the ideas came from “everybody,” and that he simply transcribed them in preparation for the meeting, as per Nathan’s instructions. For example, he testified that Quinonez made the suggestion to limit phone use to break times and emergency situations (rule #5), because Quinonez resented that Robert was spending too much time talking on the phone while the other warehouse employees were working. For the same reason, Quinonez also suggested the need to suspend employees who did not follow the rules (rule #8). As for the rule requiring employees to bring UPS boxes to a certain area (rule #6), Sandoval testified that “they” (the Employer) told him to designate a UPS area, and that he merely followed the instructions by spray painting a certain portion of the warehouse floor. Sandoval said that Rhonda Nathan insisted on rule #3, that all questions must go through Sandoval “because she didn’t want to hear anything about the guys asking questions to different people.” Sandoval admitted that he himself suggested that employees should eat lunch at the same time (rule #1); that when warehouse employees are given an order to fill, they should ask how it will be shipped (rule #4); and that all orders should have labels indicating the date of shipping and number of boxes (rule #7). Sandoval also claimed that, in any event, the rules have not been posted or enforced. For

example, Robert continued to use the warehouse phone excessively from the time of the brainstorming meeting in October 2000 until his discharge three months later, yet Robert was never suspended for violating “rule #5.”

As noted above, Larry responded affirmatively to a question regarding whether he gave Sandoval authority to suspend employees. In response to follow-up questioning by the Hearing Officer, Larry claimed that, at the October brainstorming meeting, Sandoval suggested that he himself (Sandoval) should be able to suspend employees in order to improve warehouse operations, and that Larry agreed. By contrast, Sandoval testified that he suggested that *Larry* take action against employees who do not comply with the company’s rules. Sandoval denied being given authority to suspend employees. There is no evidence that Sandoval has ever suspended or otherwise disciplined warehouse employees. Larry testified that “the situation hasn’t come up.”¹⁰

The record contains a great deal of testimony regarding the assignment of work to warehouse employees. As noted above, Sandoval considers himself a “leadperson,” and there appears to be no dispute that he gives some instructions to warehouse employees. However, the parties’ respective witnesses appear to dispute whether Sandoval independently decides the priorities and assignments of specific tasks, or whether he merely relays instructions based on parameters set by the Employer and by the customers’ orders, and/or translates instructions into Spanish for employees who are less proficient in English. Larry Khazzam testified that, from the beginning to the end of the process, Sandoval is the person who decides which warehouse employees should perform

¹⁰ Contrary to an assertion at p. 13 of the Employer’s brief, the rules themselves do not “demonstrate that Sandoval has authority to suspend employees for infractions of the[] rules.” Rule #8 is phrased in the passive voice, i.e., that employees who do not follow instructions “will be suspend[ed].” The rules themselves do not specify *who* will actually carry out the suspension, i.e., Sandoval, Khazzams or someone

which specific tasks. For example, when the Employer receives a shipment of imported clothing, some items are needed immediately for outgoing orders to retailers, whereas the remaining items can be stored for later use. Larry testified that, since Sandoval has copies of customers' written orders and is aware of those needs, Sandoval tells certain employees to bring the quantity needed for immediate shipment to the preparation area, and tells other employees to store the remainder on the warehouse shelves or pallets. Similarly, Larry testified that Sandoval decides who brings merchandise from the shelves, who separates the orders into different stacks in the preparation area, who boxes the orders, who brings completed orders to the shipping area, and who loads the trucks. Larry explained that Sandoval must use judgment to decide the priority of tasks at any given time, based on such factors as the customers' deadlines, which employees are available and what merchandise is available. Finally, although Larry testified that Sandoval may consult with the Khazzams on setting priorities, he usually does not. Rhonda Nathan testified that Sandoval usually talks to Larry about the priority of orders, and that she herself typically talks to Sandoval 4 to 5 times per day regarding which orders can be prepared, whether certain orders should be sent by UPS or truck, etc. However, she added that Sandoval alone decides how to delegate the tasks to specific employees.

By contrast, Sandoval testified that the instructions he gives employees are often based on instructions he has received from the Khazzams or Nathan. For example, if a high-priority order comes in, "the office" may tell Sandoval to take a particular warehouse employee off the job he is doing at the time, and tell him to take care of the

else from "upstairs." As noted above, witnesses disputed whether Sandoval was ever given the authority to suspend employees.

new order.¹¹ Sandoval claimed that he speaks English better than the other warehouse employees, and it is easier for him to simply translate the Employer's instructions into Spanish for the other employees. Furthermore, Sandoval testified that the warehouse employees work together "as a family," and often take it upon themselves to divide up the work. For example, if a truck arrives with a small delivery, one employee may say "I'll go unload that one," whereas if a large delivery arrives, one employee may ask another employee for help unloading it.

Similarly, Quinonez testified that warehouse employees know what to do, and that they do not need Sandoval to divide up the work. For example, if a delivery of 400 to 500 boxes arrives, they all help unload it, whereas if the delivery of 50 to 60 boxes arrives, employees know that they need only two of them to unload it. Quinonez claimed that the seven warehouse employees are aware of each other's work, and can easily decide among themselves who is available to unload a truck. As another example, Quinonez also explained that Eduardo Pacheco usually sweeps the warehouse at the end of the day but, if Pacheco is busy, another warehouse employee "takes the broom." Sandoval does not decide who should sweep. Quinonez also testified that priorities are set by the orders from "upstairs" and, to the extent that the Khazzams or Nathan may funnel instructions through Sandoval, it is because he speaks better English.

Finally, warehouse employee Marco Cartagna testified that he usually works in the shirt department by himself, as a sort of special assignment. Cartagna testified that if

¹¹ The Employer's brief asserts that Sandoval admitted assigning work to warehouse employees "as he sees fit," referring to pp. 192-3 of the transcript. However, that "admission" should not be taken out of context. An examination of those pages reveals that, in response to a somewhat leading question by the Hearing Officer ("You assign it [an order] as you see fit?"), Sandoval responded "Yes, I give it to the guys." However, Sandoval immediately proceeded to explain that "it depends" on what instructions or priorities the office has given him, and that he himself does not decide those priorities.

he needs help with a big job, he asks Isaac, not Sandoval, to get another warehouse employee to help him.

The record also contains a great deal of testimony regarding Sandoval's other duties which are not directly relevant to the supervisory issue (i.e., what authority he has over other employees) and the equipment he uses. This testimony will not be described in detail here. Briefly, this testimony includes whether Sandoval is "in charge" of inspecting and breaking the seals on imported containers; whether he is responsible for checking the bills of lading for outgoing orders; the extent to which he submits requests to the office for ordering warehouse supplies; the extent to which he decides where to store merchandise in the warehouse; whether he decides how orders should be shipped and whether he contacts the trucking companies; whether he has possession of the key to a locked storage container; whether the desk in the warehouse area is "his" desk, or whether all employees use it; and his use of the warehouse telephone. Generally speaking, the Employer's witnesses characterized Sandoval as primarily or exclusively responsible for performing those tasks and using that equipment, whereas the Petitioner's witnesses emphasized that other employees also break the container seals, submit requests for supplies, use the desk, etc.

Normal hours for warehouse employees are from 9:00 a.m. to 5:00 p.m., Monday through Friday. They are entitled to one 15-minute break in the late morning, and a 30-minute lunch break at 2:00 p.m. There appears to be no dispute that Sandoval decides when it is time for the morning break. Khazzam testified that the break time could vary 10 minutes earlier or later than the usual time (unspecified), depending on the rhythm of warehouse work that day. When it is time for the morning break, Sandoval makes an

announcement over some sort of microphone or public address system. As mentioned above, Sandoval admits he was the person who suggested, at the October 2000 brainstorming meeting, requiring all employees to take their lunch break at the same time. Nathan testified that she told the Khazzams her personal opinion that the lunch times should be staggered, but that the Khazzams nevertheless decided to adopt Sandoval's suggestion.

Witnesses differed as to whether Sandoval may authorize warehouse employees to work and get paid for overtime. Larry testified that Sandoval may independently ask employees to work overtime on weeknights without getting permission from the Khazzams.¹² Lory testified that if she knows a shipment is expected to arrive a little late (e.g., 5:30 p.m.), she notifies Sandoval directly, whereas if a shipment will arrive very late (e.g., 7:00 p.m. or later), she notifies one of the Khazzams who, in turn, asks the warehouse employees if they would like to work overtime that night. By contrast, Sandoval testified that if employees have to work overtime, he must check with the Khazzams. When Sandoval used to carpool with other employees, the Khazzams would ask Sandoval if he and the others would like to stay an extra hour to finish a particular job, and Sandoval in turn would ask the other employees if they were willing to stay. However, Sandoval denied having independent authority to authorize overtime. Finally, Quinonez testified that only the Khazzams, not Sandoval, ask him if he wants to work overtime.

Sandoval also testified that he does not keep warehouse employees' time records. However, Lory testified that Sandoval has notified her when employees' punch-out times

do not correspond to when they stopped working. For example, Sandoval once told Lory that Perez and Quinonez had stopped working at 5:15 p.m. even though they did not punch out until around 6:30 p.m. According to Lory, he asked her to change their time cards. Lory, who testified she did not believe she had authority to change time cards, notified the Khazzams about it. On that particular occasion, Larry told her to change the card and put his (Larry's) initials. Since then, on other unspecified occasions, Lory has changed time cards based on Sandoval's reports, and then notified Larry or Isaac afterwards that she put their initials on the card. Lory claimed that the Khazzams have said: "Whatever Henry [Sandoval] tells you."

There appears to be no dispute that Sandoval does not grant time off to warehouse employees. Larry explained that employees do not get paid time off such as vacation time. Employees who want to take an unpaid day off either notify the office, or they simply fail to show up that day. Isaac later testified that if employees need to arrange a day off in advance, they usually ask him (Isaac), and that employees call the office if they are sick. Sandoval testified that he has never granted vacation time or other time off.

Sandoval testified that he spends most of his time performing the same work that other warehouse employees perform, although he is the only one who uses the computer. Similarly, Quinonez testified that Sandoval performs the same warehouse duties (loading and unloading trucks, putting merchandise on shelves, etc.), and that Sandoval also uses the computer.

¹² Larry initially testified that Sandoval may independently ask employees to work overtime on Saturdays as well. However, Larry then stated that Sandoval has to ask the Khazzams about working on Saturdays, to make sure someone will be available to open the facility.

Sandoval testified that he has never laid off, rewarded or promoted warehouse employees. The record contains no evidence that Sandoval has transferred employees or adjusted their grievances.¹³

Regarding the presence or absence of supervisory personnel in the warehouse, the record clearly indicates that Sandoval spends most of his time in the warehouse, although he sometimes goes upstairs to retrieve written orders from customers, and to talk to the Khazzams, Nathan, Lory or other office employees about the orders. Larry testified that he and his father work at the Plainview facility approximately 4 to 4½ days per week, and that they also work outside away from the facility (for example, to meet with customers). Larry did not estimate how much time he spends in the warehouse specifically, as opposed to the office. Presumably, since he testified in great detail regarding Sandoval's duties, Larry must spend enough time "downstairs" to observe the warehouse operations there in detail. Isaac testified that he himself spends an average of 45 minutes per day in the warehouse, and that he sometimes looks down into the warehouse from a conference room window on the second floor. Furthermore, it is obvious from the record that Sandoval is in frequent contact with both Lory (regarding incoming shipments) and Nathan (regarding outgoing orders), whether by telephone or in person. For example, as noted above, Nathan testified that she speaks to Sandoval 4 to 5 times per day regarding customers' orders. On the other hand, Nathan also testified that she spends less time downstairs now (approximately 30 to 60 minutes per day), since the Khazzams told her in October 2000 that Sandoval was in charge of the warehouse.

¹³ In fact, some evidence suggests that Sandoval made an unsuccessful attempt to address employees' grievances. Specifically, Nathan testified that there was a meeting in approximately September 2000, where Sandoval spoke on behalf employees in requesting, *inter alia*, paid vacation days and sick days.

As mentioned above, the Employer's witnesses claimed that Sandoval was officially promoted to a supervisory position in October 2000. There is no dispute that he received a wage increase of \$3.00 per hour at that time, and that he is the highest-paid person in the warehouse,¹⁴ although witnesses differed as to the reasons. Larry testified that he and his father decided to increase Sandoval's hourly wage as part of his promotion to "warehouse manager." By contrast, Sandoval testified that he received a raise because of his job performance, including his superior knowledge of the warehouse, his ability to get orders out quickly, and his use of the computer. Sandoval said he was never told that he got the raise to be "in charge" or a "supervisor." According to Sandoval, Isaac said he deserved a raise because he worked very hard, but also that Isaac wanted him to be more "responsible." Sandoval explained that Isaac wanted him, for example, to get to work on time, since his carpool used to be late whenever Sandoval's car broke down. (It is not clear from Sandoval's testimony whether he claims that Isaac actually said this, or whether this is how Sandoval himself interpreted the word "responsible.") Lory also testified regarding Sandoval's raise, but her testimony essentially consisted of hearsay, i.e., what Sandoval and Isaac told her about it. Isaac did not testify about the wage increase specifically.

Witnesses also differed as to whether management ever said that Sandoval was a supervisor. Sandoval himself testified that nobody ever told *him* he was a "supervisor" or "manager," and that nobody ever told *other* employees he was the "boss." Likewise, Quinonez and Cartagna both testified that the Khazzams never said that Sandoval was the

¹⁴ Specifically, Sandoval's hourly wage increased from \$12.00 to \$15.00 in October 2000, compared with other warehouse employees who earn between \$8.50 and \$12.50 per hour. Sandoval now earns a higher rate than Quinonez, even though Quinonez has been employed by Echo Lakes for a longer time.

supervisor. By contrast, office employees Nathan and Lory both testified that the Khazzams told them that Sandoval had become a supervisor. Specifically, Nathan testified that the Khazzams told her that Sandoval was “in charge” now. Lory testified that, during a conversation regarding Sandoval’s wage increase in October 2000, Isaac told her that Sandoval was supervising the warehouse. Isaac also testified that, after Sandoval complained about Robert, Isaac told Robert he had to get along with Sandoval because he is the “boss.”

The record indicates that the Employer sometimes lends money to employees. It appears that the Employer has given bigger loans to Sandoval than other people in the warehouse. Sandoval does not receive medical benefits, pension benefits, paid time off or any other benefits that warehouse employees do not get.

Discussion of Supervisory Issue

In enacting Section 2(11)'s definition of "supervisor," Congress stressed that only individuals invested with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen ... and other minor supervisory employees." Quadrex Environmental Company, Inc., 308 NLRB 101, 102 (1992)(quoting S.Rep. No. 105, 80th Cong., 1 Sess. 4 (1947)). It has long been the Board's policy not to construe supervisory status too broadly, since a finding of supervisory status deprives individuals of important rights protected under the Act. Id. A party who seeks to exclude alleged supervisors from a bargaining unit therefore has the legal burden of proving their supervisory status. Tuscan Gas & Electric Co., 241 NLRB 181 (1979); The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989). Furthermore, to prove supervisory status under Section 2(11), the party must demonstrate not only that

the individual has certain specified types of authority over employees (e.g., to assign or responsibly direct them), but also that the exercise of such authority requires the use of "independent judgment," and is not merely "routine" in nature.

In the instant case, I find that the Employer has not met its burden of proving that Henry Sandoval is a supervisor as defined in the Act. At most, the record evidence demonstrates that Sandoval possesses some low-level authority as a leadperson to assign and oversee employees, but without using independent supervisory judgment and without exercising any real authority over their employment status.

The Employer asserts that Sandoval has authority to hire employees, and that he actually hired six employees. However, the record does not clearly support such an assertion. First of all, four of the six purported examples of Sandoval hiring employees (Perez, Rodriguez, Mendez and Laeva) occurred more than a year ago, before Sandoval allegedly became a supervisor, de facto or otherwise, and Sandoval denies recommending three of those four (Rodriguez, Mendez and Laeva) in any event. One of the more recent examples – the hiring of Rudy DeLeon in the autumn of 2000 – was also disputed.

Although Larry and Isaac Khazzam testified that Sandoval “brought in” DeLeon to work, both Sandoval and Quinonez testified that it was *Quinonez* who referred his friend DeLeon to fill the warehouse vacancy. Furthermore, the testimony regarding the hiring of Eduardo Pacheco in April 2000 was likewise contradictory and inconclusive.

Although there is no dispute that Sandoval brought Pacheco (his brother-in-law) to the facility one morning as a job candidate, the witnesses completed disagreed as to how Pacheco was actually hired. On one hand, the Khazzams denied interviewing or hiring Pacheco, and insisted that Sandoval alone hired Pacheco. On the other hand, Sandoval

testified that Pacheco went “upstairs” to the office for about 15 minutes that morning before coming down to the warehouse to work. Pacheco himself did not testify in this proceeding, and other testimony consisted of mere hearsay (i.e., Sandoval’s testimony that Pacheco said that Isaac hired him, versus Lory’s testimony that the Khazzams told her that Sandoval hired him). On this record, it is simply impossible to determine whether Sandoval hired or effectively recommended hiring Pacheco, or whether the Khazzams actually interviewed Pacheco and decided to hire him. In such circumstances, the Board has held that supervisory authority has not been established. Lakeview Health Center, 308 NLRB 75, 78 (1992)(where evidence is conflicting or inconclusive regarding a particular indicium of supervisory authority, the Board finds that supervisory status has not been established with respect to that indicium); Children’s Farm Home, 324 NLRB 61, 64 (1997)(same).

Moreover, the record indicates that the Employer recruits new warehouse employees by the word-of-mouth referral of current employees’ friends and relatives, in addition to placing newspaper advertisements. As noted above, Larry stated that it is “public knowledge” when warehouse help is needed, and that the company asks Sandoval and other warehouse employees whether they “know anyone” looking for work. It appears from the record that Sandoval referred at least one candidate (Perez) for employment at a time when Sandoval was undisputedly a non-supervisory warehouse employee. Furthermore, warehouse employee Quinonez also testified that he himself has referred other employees over the years, including Sandoval, DeLeon, Quinonez’s friend Laeva, and another warehouse employee named Ignacio Estrada. Thus, to the extent that Sandoval may have “brought in” candidates such as his brother-in-law Pacheco in the

past year, the record does not clearly establish that Sandoval exercised *supervisory* authority to effectively recommend their hire, as opposed to simply referring acquaintances to fill a vacancy, as any rank-and-file employee could do. The Board has held that employees' practice of recommending friends, family members or acquaintances for employment does not itself establish supervisory authority to effectively recommend to hire employees. Footes's Dixie Candy, Inc., 223 NLRB 1363, 1365 (1976)(employee who recommended cousin for hire not a supervisor, where other employees also sought jobs for their friends and relatives, whom the manager generally hired), *citing* J.C. Penney Co., Inc. (Store #1814), 172 NLRB 1279, 1280 (1968)(in small industry where manager asked "everyone" for referrals when vacancies occurred, and where employees routinely referred friends and acquaintances to fill vacancies, no indication of supervisory status). *See also* Edinburg Mfg. Co., 164 NLRB 121, 123 (1967).

The evidence is also inconclusive as to whether the Employer ever gave Sandoval the authority to suspend employees. Inasmuch as Larry and Sandoval's testimony was contradictory on this point, supervisory authority with regard to that indicium has not been demonstrated. Lakeview Health Center, *supra*. Furthermore, contrary to an assertion in the Employer's brief, the warehouse "rules" (Er. Ex. 1) do not demonstrate that Sandoval possesses authority to suspend employees, and there is no other documentary evidence confirming that Sandoval possesses such authority. Finally, there is no evidence that Sandoval has actually exercised any authority to suspend or otherwise discipline employees.

This problem of inconclusive evidence -- with materially conflicting testimony from the Employer's four witnesses and the Petitioner's three witnesses -- also undermines the Employer's case in other regards. As described in more detail above, the witnesses disputed whether Sandoval independently generated "rules" governing the warehouse, as opposed to simply transcribing suggestions from himself and other sources; whether Sandoval may independently authorize overtime work without approval from the office; and whether Sandoval may independently control the hours for which employees get paid, as opposed to simply reporting discrepancies to Lory, who in turn obtains the Khazzams' approval for changing the employees' time cards. Furthermore, there is no documentary evidence -- such as time cards that were changed, signed or initialed by Sandoval -- to support the company witnesses' assertions in this regard. The record therefore fails to establish Sandoval's supervisory authority as to these indicia with any certainty.

Furthermore, the record does not establish that Sandoval has played any role in discharging employees, or effectively recommending their discharge. Although Larry Khazzam initially testified that Sandoval recommended the discharge of Robert, he later conceded that Sandoval did not in fact recommend discharging Robert, and that the Khazzams decided to discharge Robert for an infraction that had "nothing to do with the warehouse function."

As for the assignment of work, there appears to be no dispute that Sandoval makes at least some decisions regarding which warehouse employees should perform which specific tasks. For present purposes, the issue is whether such assignment entails independent supervisory judgment. In such cases as Brown & Root, Inc., 314 NLRB 19,

21-2 (1994), and Quality Chemical, Inc., 324 NLRB 328, 330 (1997), the Board has found that where foremen's or leadpersons' assignment or direction of employees is based on their greater experience or knowledge, it does not necessarily demonstrate a level of independent judgment required by Section 2(11). Similarly, in such cases as Bay Area-Los Angeles Express, Inc., 275 NLRB 1063 (1985), the Board has found that dispatchers -- who assign work based on parameters pre-established by the employer, availability of employees and other common-sense considerations -- are assigning work in a "routine" manner, not requiring independent judgment. In this case, I find no evidence that Sandoval's assignment of warehouse employees requires the type of independent judgment envisioned by Section 2(11). Rather, the record indicates that such assignment is based on the customers' deadlines (ship dates and cancellation dates), availability of employees, availability of merchandise and other common-sense and non-discretionary considerations. In some cases, the priorities and shipping instructions are expressly dictated by the Khazzams and by the customers' demands, and Sandoval merely delegates the specific tasks to available employees. In some cases, employees already have assignments pre-established by the Employer, such as Cartagna's assignment to the shirt department. In other cases, the employees may simply divide the work among themselves, underlining the routine nature of such division. Thus, Sandoval's authority as a leadperson to direct employees essentially constitutes a routine delegation of tasks, insufficient to confer supervisory status. Similarly, the scheduling of warehouse employees' morning break time -- which varies only 10 minutes earlier or later, depending on the work flow -- does not require a sufficient exercise of independent judgment to satisfy Section 2(11). Finally, even Sandoval's suggestion regarding

employees' lunch time, with which Nathan disagreed, was subject to final approval by the Khazzams.

As noted above, the record contains a great deal of testimony (some disputed) regarding Sandoval's other duties, such as his responsibility for breaking the seals on imported containers and inspecting their contents, and his greater use of the computer. At most, these duties demonstrate that Sandoval is a trusted employee to whom the Employer has given a greater level of responsibility in the warehouse. However, they do not demonstrate any *supervisory* authority over other warehouse employees, and need not be discussed in detail here.

In sum, I have found the evidence insufficient to prove that Sandoval possesses independent authority to hire, discipline, suspend or discharge employees, to authorize overtime, or to correct their time records. I have also found no evidence that Sandoval exercises independent, non-routine supervisory judgment in the assignment and direction of warehouse employees, and in deciding their break time.. Finally, there is no evidence that Sandoval has authority to reward, promote, transfer, layoff or recall employees, to grant time off, or to adjust employees' grievances. Absent proof of such "primary" statutory criteria, the secondary indicia (e.g., superior pay, bigger loans from the Employer, possession of keys) are insufficient to support a finding of supervisory status. Bay Area, *supra*, 275 NLRB at 1080; Memphis Furniture Mfg. Co., 232 NLRB 1018, 1020 (1977).

Finally, the Employer's brief asserts that Sandoval must be a supervisor because, otherwise, the warehouse employees would be "without supervision." However, the record indicates that Isaac Khazzam goes to the warehouse every day, and that the

warehouse is in frequent communication with the office upstairs regarding customers' orders and other issues. Thus, as a factual matter, the record does not support the Employer's assertion. Furthermore, the cases cited by the Employer for its "absence of supervision" argument are not on point. The Employer cites an administrative law judge's finding of supervisory status in Cassis Management Corp., 323 NLRB 456, 463 (1997), but that finding was expressly reversed by the Board. Westinghouse News Co., 195 NLRB 339 (1972), in which news producers were found to be supervisors, had nothing to do with the absence of other supervisors; in fact, the facility in that case also had a news director, program manager and general manager. Finally, in Mission Petroleum Carriers, Inc., 229 NLRB 1276, 1281 (1977), the employer operated several terminals, from which truck drivers delivered petroleum. A dispatcher at one particular terminal -- who had independent authority to hire employees, grant time off, and correct employees' time records -- was found to be a supervisor. The administrative law judge also noted that the dispatcher was the only "managerial" person with whom the drivers communicated. (It appears that the manager may have been located at another terminal.) In any event, Mission Petroleum is distinguishable, inasmuch as Sandoval is not the only "management representative" at the facility. Rather, the Khazzams and other office personnel are located only one floor away; there is frequent communication between the warehouse and the office; and the warehouse can even be seen from an office window. I therefore reject the Employer's assertion that any "absence" of other supervision proves that Sandoval must be a supervisor.

Based on the foregoing, I therefore conclude that the Employer has not met its burden under Tuscan Gas, supra, of proving that Sandoval is a supervisor as defined in Section 2(11) of the Act. He will be eligible to vote in the election directed below.

I further find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a)(1) of the Act:

All full-time and regular part-time warehouse employees employed by the Employer at its 170 Express Street, Plainview, New York facility, but excluding clerical employees, managerial employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those

eligible shall vote whether they desire to be represented for collective bargaining purposes by the International Brotherhood of Trade Unions, Local 713.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of the election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before April 26, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. Club

Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by May 3, 2001.

Dated at Brooklyn, New York, April 19, 2001.

/S/ ALVIN BLYER

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

177-8560-1500
177-8560-4000

APPENDIX

The transcript is hereby amended as follows:

Page 7, line 10: “and eligible” rather than “illegible”.

Page 7, line 24: “sufficient” rather than “insufficient”.

Page 23, line 18: “stores” rather than “shores”.

Page 36, line 22: “seat” rather than “see”.

Page 63, line 9 et seq.: All references to Mario “Callones” should be spelled “Quinonez”.

Page 157, line 24: “Señor Jefe” [Spanish for “Mr. Boss”] rather than “Senior Hefe”.

Page 189, line 7: “hammer” rather than “ham”.

Page 249, line 5: “onus” rather than “ownis”.

Page 347, line 24: “HEARING OFFICER” rather than “JUDGE MARCIONESE”.